

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

**2:14-cr-00177-JAD-GWF**

[ECF No. 97]

10 In 2015, Gregory Akel pleaded guilty to receipt of child pornography,<sup>1</sup> and the presiding  
11 district judge sentenced him to 112 months in prison after the government breached the terms of the  
12 plea agreement by failing to affirmatively recommend a sentence at the low-end of the guidelines  
13 range. The Ninth Circuit granted Akel’s unopposed motion for summary reversal and remanded and  
14 reassigned the case for resentencing. After remand but before resentencing, Akel, who is now  
15 represented by new counsel, moved to withdraw his nearly two-year-old guilty plea.<sup>2</sup> Because Akel  
16 did not request this relief on appeal to the Ninth Circuit—which, at Akel’s request, directed specific  
17 performance of the plea agreement as the sole remedy for the government’s breach—and he has not  
18 shown that a fair and just reason exists to permit him to withdraw the plea, I deny the motion.

## Background<sup>3</sup>

20 On March 17, 2013, Las Vegas Metropolitan Police Department Task Force officers (Metro)  
21 began investigating the sharing of child pornography files on the ARES file-sharing network.<sup>4</sup>  
22 During that investigation, Metro traced an IP address, from which they were able to download child-

24 || <sup>1</sup> ECF No. 49.

25 || <sup>2</sup> ECF No. 97.

<sup>26</sup> <sup>3</sup> These facts are taken from Akel's plea agreement and are admissible at any proceeding even if Akel withdraws his plea agreement. ECF No. 49 at 7.

28 || <sup>4</sup> *Id.* at 4.

1 pornography files, to Akel.<sup>5</sup> In August 2013, Metro seized two laptops, a tablet, and related items  
2 during a warranted search of Akel's Silverado Ranch apartment.<sup>6</sup> A forensic analysis of one of the  
3 laptop computers revealed 39 images of child pornography and 107 child-pornography videos.<sup>7</sup>

4 In January 2014, Special Agents from the Department of Homeland Security (DHS) also  
5 began investigating the distribution of child pornography on the ARES file-sharing network during  
6 which they traced a different IP address, from which the agents were able to download three movies  
7 containing child pornography, to Akel, who was now residing at a Hazlewood Street apartment.<sup>8</sup> In  
8 February 2014, Metro traced a third IP address identified as a source of child-pornography files to  
9 Akel at his Hazlewood Street apartment.<sup>9</sup>

10 Upon learning that they were investigating the same target, Metro and DHS combined their  
11 investigations and seized a laptop, notebook, SD card, and related items during a warranted search of  
12 Akel's Hazlewood Street apartment in April 2014.<sup>10</sup> Investigators recovered 39 partial videos and 11  
13 images containing child pornography from the laptop.<sup>11</sup>

14 Forensic examiners compared the images and videos found on all of the items seized during  
15 these searches against a databank of child pornography and determined that Akel possessed a  
16 combined total of 149 videos and 54 images of child pornography, that some of those files depicted  
17 prepubescent children or children under the age of 12, and that Akel used a computer to receive and  
18 distribute child pornography over the internet.<sup>12</sup>

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20 <sup>5</sup> *Id.* at 5.

21 <sup>6</sup> *Id.*

22 <sup>7</sup> *Id.*

23 <sup>8</sup> *Id.*

24 <sup>9</sup> *Id.* at 6.

25 <sup>10</sup> *Id.*

26 <sup>11</sup> *Id.*

27 <sup>12</sup> *Id.* at 7.

1       In May 2014, Akel was charged with one count of receipt or distribution of child  
 2 pornography and one count of possession of child pornography.<sup>13</sup> He pleaded guilty to one count of  
 3 receipt of child pornography ten months later.<sup>14</sup> In the written plea agreement, the parties stipulated  
 4 to a total offense level of 30, and they agreed to jointly recommend a low-end guidelines-range  
 5 sentence of 97–121 months.<sup>15</sup> At Akel’s March 2015 sentencing hearing, the government failed to  
 6 recommend a low-end sentence,<sup>16</sup> and the sentencing judge sentenced Akel to a mid-range sentence  
 7 of 112 months.<sup>17</sup>

8       Akel appealed, contending that the government breached the plea agreement by failing to  
 9 recommend a low-end sentence, and he requested that his sentence be vacated and that the case be  
 10 remanded to a different district judge for resentencing.<sup>18</sup> The government did not oppose Akel’s  
 11 appeal, and the Ninth Circuit panel did precisely as Akel requested: it reversed, remanded, and  
 12 reassigned the case to me for resentencing. At Akel’s scheduled resentencing hearing on January 5,  
 13 2017, Akel’s counsel moved to continue the sentencing pending the outcome of an unrelated case,  
 14 which he anticipated could impact Akel’s sentence.<sup>19</sup> The government did not object to the  
 15 continuance, and I continued the hearing to March 7, 2017.

16       On the eve of the rescheduled resentencing hearing, the parties stipulated to a 60-day  
 17 continuance, and Akel moved to withdraw his guilty plea.<sup>20</sup> Akel argues that he should be allowed to

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19       <sup>13</sup> ECF No. 1.

20       <sup>14</sup> ECF No. 49.

21       <sup>15</sup> *Id.* at 11. The parties agreed to jointly recommend a sentence at the low end of the guidelines  
 22 range as calculated by the court, and the sentencing judge adopted the range suggested by the parties.

23       <sup>16</sup> The sentencing transcripts reflect that Akel’s counsel argued for a low-end sentence of 97 months,  
 24 and the government did not affirmatively recommend a sentence.

25       <sup>17</sup> ECF No. 65.

26       <sup>18</sup> *United States v. Akel*, No. 15-10494 (9th Cir. April 27, 2016) (Appellant’s Opening Brief).

27       <sup>19</sup> ECF No. 94 (minutes).

28       <sup>20</sup> ECF Nos. 96, 97.

1 withdraw his guilty plea as a remedy for the government's breach of the plea agreement, because  
 2 prior counsel did not make him aware of several possible defenses available to him before he entered  
 3 his plea, and he claims that his plea was the result of prosecutorial coercion.

4 **Discussion**

5 **A. Withdrawing a guilty plea**

6 A defendant may withdraw a guilty plea before sentencing if he "can show a fair and just  
 7 reason for requesting the withdrawal."<sup>21</sup> In this circuit, fair and just reasons for withdrawing a guilty  
 8 plea include "inadequate Rule 11 plea colloquies, newly discovered evidence, intervening  
 9 circumstances, or any other reason for withdrawing the plea that did not exist when [he] entered his  
 10 plea."<sup>22</sup> But the Ninth Circuit has cautioned that a defendant may not "withdraw his guilty plea  
 11 simply on a lark,"<sup>23</sup> and that allowing a defendant "to withdraw his guilty plea merely because he  
 12 changed his mind would undermine Rule 11's purpose and reduce plea proceedings to a time-  
 13 consuming formality with no lasting effect."<sup>24</sup> In determining whether to allow the defendant to  
 14 withdraw his plea, important factors include whether the defendant has asserted his legal innocence,  
 15 why the defenses were not put forward at the time of the original pleading, and the amount of time  
 16 that has passed between the plea and the motion.<sup>25</sup>

17 **B. Akel provides no valid basis to withdraw his plea.**

18 **1. The government's breach does not warrant withdrawal.**

19 Akel first claims that he should be allowed to withdraw his guilty plea based on the  
 20 government's breach during the initial sentencing.<sup>26</sup> I am persuaded by the government's arguments

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21 FED. R. CRIM. P. 11(d)(2)(B).

22 *United States v. Showalter*, 569 F.3d 1150, 1154 (9th Cir. 2009) (quoting *United States v. McTiernan*, 546 F.3d 1160, 1167 (9th Cir. 2008)).

23 *McTiernan*, 546 F.3d at 1167 (quoting *United States v. Hyde*, 520 U.S. 670, 676–77 (1997)).

24 *United States v. Rios-Ortiz*, 830 F.2d 1067, 1070 (9th Cir. 1987).

25 *McTiernan*, 546 F.3d at 1167 (citing FED. R. CRIM. P. 32 advisory committee's note (1983)).

26 ECF No. 97 at 7–8.

1 that Akel should be equitably estopped from requesting this relief and that the law of the case  
 2 prevents Akel from requesting this remedy because he did not do so on appeal.<sup>27</sup> Akel fully litigated  
 3 in the Ninth Circuit the breach claim on which he now seeks to withdraw his guilty plea. There, he  
 4 took the position that specific performance was the appropriate remedy, and he specifically requested  
 5 that the Court of Appeals vacate his sentence and remand the matter to a different district judge for  
 6 resentencing. The Ninth Circuit panel necessarily considered what remedy was appropriate for the  
 7 breach, and it granted Akel the specific remedy he requested.<sup>28</sup> Akel cannot now seek a different  
 8 remedy in lieu of the one that he specifically requested and was granted on appeal.

9 I also find that specific performance of the plea agreement is the appropriate remedy here.  
 10 Specific performance of the plea agreement will completely cure the government's breach at the  
 11 initial sentencing and give Akel the full benefits due to him under that agreement.<sup>29</sup> Besides mere  
 12 preference, Akel has not shown that withdrawal of the guilty plea is the appropriate remedy for the  
 13 government's breach.

14 **2. The alleged "possible defenses" do not warrant withdrawal.**

15 "Erroneous or inadequate legal advice may also constitute a fair and just reason for plea  
 16 withdrawal, even without a showing of prejudice, when the motion to withdraw is made  
 17 presentence."<sup>30</sup> A defendant claiming inadequate legal advice is not required to establish that the  
 18 foregone defense or argument would have been "successful on the merits," only that proper advice  
 19 could plausibly have motivated a reasonable person in the defendant's position not to have pleaded  
 20 guilty.<sup>31</sup>

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 22 <sup>27</sup> ECF No. 100 at 4.

23 <sup>28</sup> *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000) (for the law-of-the-case  
 24 doctrine to apply, "the issue in question must have been decided explicitly or by necessary  
 implication in [the] previous disposition").

25 <sup>29</sup> I also note that Akel agreed in the plea agreement "not to seek to withdraw" his guilty plea after he  
 26 entered it in court. ECF No. 49 at 3.

27 <sup>30</sup> *McTiernan*, 546 F.3d at 1167.

28 <sup>31</sup> See *id.* at 1168.

1 Akel argues that his counsel failed to advise him about these available defenses: (1) sexual  
 2 exploitation under U.S.C. § 2252 requires a physical or tangible object of which an image is not; (2)  
 3 he did not sexually abuse or exploit a person; (3) the federal government does not have jurisdiction  
 4 over the offense to which he pleaded guilty; (4) lack of subject-matter jurisdiction; and (5) the  
 5 internet does not implicate the Commerce Clause of the Constitution.<sup>32</sup>

6 Akel makes no effort to show that proper legal advice about these defenses could have  
 7 plausibly motivated a reasonable person in his position not to plead guilty. This is likely because the  
 8 defenses he identifies are frivolous, and proper advice about their existence should not motivate a  
 9 reasonable person in Akel's position not to plead guilty. A conviction under 18 U.S.C. 2252(a)(2) &  
 10 (b)(1) does not require possession of a "physical or tangible object" but requires only possession of a  
 11 "visual depiction." Nor does a conviction under this statute require that the defendant actually  
 12 committed the sexual abuse or exploitation.<sup>33</sup> Akel's jurisdictional objections have also been  
 13 rejected in this circuit.<sup>34</sup> Though I recognize that Akel need not show that he would ultimately  
 14 prevail on any of these defenses, I point out their frivolity to illustrate that Akel fails to carry his  
 15 burden to show that proper advice about these defenses and their possible availability would have  
 16 plausibly motivated a reasonable person in his position not to have pleaded guilty.

17 **3. The record belies Akel's duress claim.**

18 Akel claims that he pleaded guilty under duress because the government threatened to add  
 19 additional counts or to charge him with additional images or distribution, which may have subjected  
 20 him to a higher mandatory minimum, if he did not accept the plea deal.<sup>35</sup> This claim is belied by the  
 21 record. Akel acknowledged in the written plea agreement that the agreement resulted from an "arms-  
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24 <sup>32</sup> ECF No. 97 at 9.

25 <sup>33</sup> See 18 U.S.C. § 2252(a)(2).

26 <sup>34</sup> *United States v. Sullivan*, 797 F.3d 623, 631–32 (9th Cir. 2015) (Congress is permitted to regulate  
 27 even purely intrastate distribution and possession of child pornography).

28 <sup>35</sup> ECF No. 97 at 10.

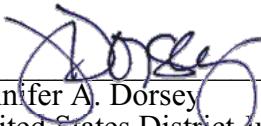
1 length negotiation,”<sup>36</sup> and he affirmed that “he decided to plead guilty voluntarily and that no one  
 2 coerced or threatened him” to do so.<sup>37</sup> Akel likewise acknowledged the voluntary nature of his plea  
 3 at the change-of-plea hearing.<sup>38</sup> I also agree with the government’s contention that Akel’s arguments  
 4 on appeal—that the government breached the plea agreement by failing to recommend a low-end  
 5 sentence—presupposed the existence of a valid plea agreement.<sup>39</sup> The same is true for Akel’s first  
 6 argument to withdraw his plea based on the government’s breach. So, it is disingenuous for Akel to  
 7 now challenge the validity of that agreement.

8 Finally, I note that Akel does not assert a claim of actual innocence or a plausible claim of  
 9 legal innocence, and the nearly two-year gap between Akel’s plea and the withdrawal motion  
 10 strongly weighs against withdrawal. Because Akel has not carried his burden to show a fair or just  
 11 reason for withdrawing his plea, I deny his motion.

12 **Conclusion**

13 Accordingly, IT IS HEREBY ORDERED that Akel’s motion to withdraw guilty plea [ECF  
 14 No. 97] is DENIED.

15 Dated this 5th day of April, 2017.

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 17 Jennifer A. Dorsey  
 United States District Judge

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 24 <sup>36</sup> That the government agreed not to bring any additional charges and to dismiss the second count of  
 25 the indictment in exchange for Akel’s guilty plea supports this representation.

26 <sup>37</sup> See ECF No. 49.

27 <sup>38</sup> ECF No. 76 at 12–13.

28 <sup>39</sup> ECF No. 100 at 8.